IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

ISER H. NAKDIMEN et al.,
Petitioners,

vs.

LAZARE BAKER,
Respondent.

No. 172.

OPPOSING BRIEF OF RESPONDENT ON PETITION FOR CERTIORARI.

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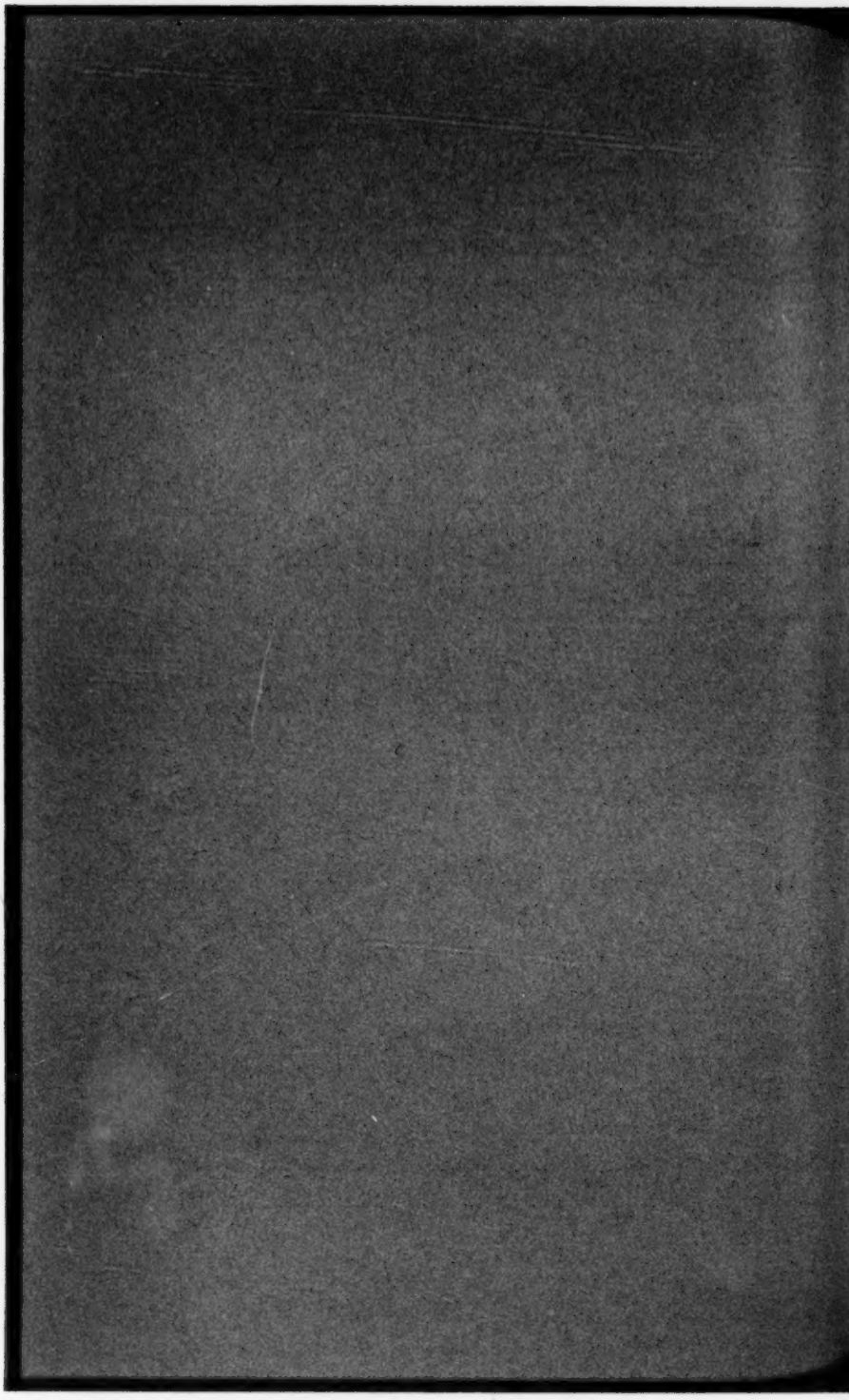

INDEX.

Cases Cited.

Textbooks Cited.

Statute Cited.

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STATEMENT.

This suit begun October 27, 1936, in the District Court of the United States for the Western District of Arkansas, was first tried before Honorable Heartsill Ragan, District Judge, and a jury, and there was a verdict and judgment for plaintiff for $13,125.00, with certain interest on January 28, 1938.

On the first appeal the United States Circuit Court of Appeals on December 12, 1938, reversed and remanded the case, with instructions to grant a new trial and to permit the parties to amend their pleadings, if they should so elect, or to require them to do so if the Court should so direct (R. 8). Nakdimen v. Baker, 100 Fed. (2d) 195.

The second amended petition of plaintiff was filed in the District Court February 4, 1939. The answer of defendant was filed May 29, 1939 (R. 15). The case was tried before Judge Lemley, without a jury, September 26, 1939, by agreement of the parties upon transcript of the evidence at the former trial (No. 11,190 in the United States Circuit Court of Appeals), and resulted in judgment on September 26, 1939, for plaintiff for $13,125.00, with interest at 6 per cent per annum *from the date of the judgment only* (R. 20).

Requested findings of fact of plaintiff (R. 21) were granted that day (R. 25), as were plaintiff's requests for conclusions of law (R. 25-27). Defendant's requested findings of fact 1 and 2 expressing the agreement of sale were granted, and requests of defendant Nos. 3 to 12 were refused (R. 27). Defendant's requested conclusions of law (R. 29-30) were refused.

Defendant appealed and the Court of Appeals affirmed the judgment.

A writ of certiorari is now sought from this Court to the Court of Appeals.

THE FIRST APPEAL.

Proceedings in the first trial and on the first appeal are referred to because of contentions now made by defendant petitioners.

The first amended petition (Record in 11,190, page 2) in the first trial sought recovery for the failure and refusal of defendant to carry out an agreement of sale by plaintiff and purchase by defendant of shares of plaintiff in the City National Company by failing and refusing to contemporaneously deliver his note with the collateral sold in payment to plaintiff. The agreement of sale was by answer, in effect, admitted (11,190, page 8).

Judge Ragan's instruction to the jury in the former trial, with respect to the agreement, was stated to be as follows (Record in No. 11,190, pages 82, 83) and the Court of Appeals in its decision on the first and second appeals found the same to be the agreement (Nakdimen v. Baker, 100 Fed. [2d] 195, 196, and opinion on the second appeal, Record 11,690, page 41):

> "Under the pleadings and the evidence it appears an agreement was entered into at Fort Smith, Arkansas, December 6, 1935, between the plaintiff, Baker, and the defendant, Iser Nakdimen. By this agreement Baker was to transfer his 200 shares of stock, each of the par value of $100.00, in the City National Company into a certificate for the same number of shares in favor of defendant, Iser Nakdimen's wife, Celia Nakdimen, and in consideration of this transfer Iser Nakdimen was to execute and deliver his three-year noninterest note for $13,125.00 with an option to renew for another two years, the terms of which note were fully agreed on; if the note was renewed the amount of the renewal was to be $13,700.00. The three-year note obligation was to be secured by the certificate in the name of Iser Nakdimen's wife and was to be endorsed by her before being pledged to secure the note. Pursuant to this agreement the three-year note was signed by defendant, Iser Nakdimen, the certificate of stock in favor of plaintiff, Baker, was surrendered and transferred into a certificate in favor of Celia Nakdimen and by plaintiff delivered to defendant, Iser Nakdimen, for endorsement by Celia Nakdimen, and a written consent was agreed on and delivered to Iser Nakdimen December 6, 1935; the certificate in favor of Celia Nakdimen was endorsed by her that evening along with the written consent that her certificate so endorsed might be used as a pledge to secure the payment of Iser Nakdimen's note for $13,125.00. The understanding was during the day of December 6, 1935, that the

signatures would be obtained that evening and that the signed note, the Celia Nakdimen certificate endorsed and the consent of Celia Nakdimen signed would be delivered to plaintiff, Baker, the next day. Now, both parties agree that these are the terms of the contract. There is no dispute about that."

Judge Ragan instructed further on the theory of conversion (Record in 11,190, page 84). The jury found for plaintiff for the note amount, $13,125.00, with certain interest (11,199, page 17).

Defendant appealed and in defendant's brief in 11,190 contended:

> "AS A MATTER OF LAW, THIS SUIT IS UPON A CONTRACT AND NOT UPON A TORT, AND THEREFORE THE LOWER COURT COMMITTED ERROR IN THE HOLDING THAT THE ACTION WAS IN TORT" (Brief Index, page I; Brief, page 12, and page 20 in 11,190).

The Court (Nakdimen v. Baker, 100 Fed. [2d] 195 [Record 11,612, p. 8]), reversed the case on December 12, 1938, and instructed that amended pleadings be filed.

In September, 1938, the new federal rules governing pleading and civil procedure in the district courts had become effective.

PROCEEDINGS AFTER REVERSAL AND REMANDING.

Second Amended Complaint.

On February 4, 1939, plaintiff filed his second amended petition pursuant to the order of the Court of Appeals, which set forth the above agreement as to which there appears to be no question, and alleged the complete performance of the agreement on the part of the plaintiff by trans-

fer of the shares by plaintiff to defendant's wife, alleged the breach of the agreement on the part of the defendant Nakdimen in his failure and refusal to deliver, as agreed, on December 7, 1935, or thereafter, his note for $13,125.00, the signed consent and the endorsed certificate of stock, and prayed recovery of $13,125.00 (Record 11,612, p. 8).

Motion of Defendant.

On February 14, 1939, defendant filed a motion, stating:

> "Said complaint does not allege and show whether said suit is now upon contract or upon tort.
>
> "Under the first amended complaint, the Court held that the suit was upon tort, being for conversion. The Court of Appeals in its opinion, held that this court should have sustained the defendant's motion to require the plaintiff to elect, whether he is suing upon tort or upon contract. This second amended complaint is indefinite and uncertain, and does not show that it complies with the opinion of the Court of Appeals and hence the cause should be dismissed.
>
> "The Court of Appeals held that the suit could not be maintained upon conversion, and reversed the case. *If the present action is one for breach of contract, it is an attempt to change from a tort action to a contract action, and, under the decisions of the Arkansas courts, that cannot be done, and, therefore, this cause must be dismissed because it cannot be maintained upon conversion, and it cannot be changed from conversion to contract.* The said complaint does not state facts sufficient to constitute a cause of action against this defendant" (R. in 11,612, 11).

On April 24, 1939, this motion was overruled.

Answer of Defendant.

The answer of defendant to the second amended complaint was filed May 29, 1939 (R. in 11,612, 15). Defendant,

without waiving his motion to dismiss the cause, alleged as defenses *that the Court had no power or jurisdiction to change the position of the plaintiff from an alleged suit in conversion to a suit on contract;* that defendant and plaintiff on December 6, 1935, entered into a contract for the purchase and sale of 200 shares of stock of the City National Company, and alleged that such contract is a valid, binding obligation, and the defendant is ready and willing to perform said contract fully and completely, *and has been ready and willing to perform said contract from and after December 7, 1935; that defendant tendered the note and other documents on December 7, 1935,* and on refusal of plaintiff to accept the same, defendant has held the same and has not exercised any power or dominion over said note and other documents; *that the time of delivery of said note and other documents was not material "and although he tendered said documents December 7, 1935, and was ready and willing thereafter to deliver said documents, it was not a breach of said contract if said documents were not delivered on December 7, 1935, as said documents were held at all times as the property of the plaintiff." Defendant denied he failed on December 7, 1935, on demand of plaintiff, to deliver;* alleges the contract of purchase and sale was completely performed, except plaintiff refused to receive and accept said note and other documents when tendered to him, as required by the contract.

"The plaintiff alleges in his complaint that the defendant held possession of said note and said documents, *but does not allege that said note and said documents were wrongfully withheld from the plaintiff, and does not allege that they were withheld from the plaintiff in violation of the terms of said contract."*

Defendant further alleged plaintiff's second amended complaint is indefinite, because not stating "whether it is a suit to recover damages for breach of this contract, and

this defendant denies that he has in any manner breached said contract"; that defendant in his former answer to the first amended complaint, offered to perform fully and completely said contract, and prayed in his answer that plaintiff "be compelled specifically to perform said contract," and such offers of the defendant were in law and in effect, an election to exercise the option contained in the note in controversy if an option was required; that plaintiff was required by the terms of the note to give defendant sixty days' notice of the maturity of the note; that plaintiff has not given any such notice; that the defendant by his answer elects to extend the time of payment of said note; that plaintiff *by bringing "the inconsistent suit for conversion, took a position which prevented the defendant from exercising a formal option other than as herein set forth"*; that by the terms of the note it was due December 6, 1938; that the Court of Appeals did not decide the case until December 12, 1938; that the Court of Appeals did not decide defendant's motion for rehearing until January 12, 1939; that it was not possible for defendant to exercise the option by offering to perform fully and completely the contract; that the mandate of the Court of Appeals was issued January 24, 1939; that plaintiff did not file his second amended petition until February 4, 1939, and that *the "inconsistent position of the plaintiff in bringing a suit in tort prevented any earlier election of the option, except as above shown, and plaintiff is now estopped from and amending his complaint as now done"*; that defendant is ready to perform the contract in full, and offers so to do, and states that ownership of the note carries with it control of the corporate affairs of the corporation; that there is none of the stock on the market, and defendant cannot purchase and acquire such stock; that under the laws of Arkansas, defendant is entitled to specific performance of said contract of purchase and sale; that defendant cannot acquire on

the market shares to effect control; that the note and other documents are made a part of the answer; that the cause should be transferred to equity, tried and a decree rendered "compelling the plaintiff specifically to perform said contract, and that the due date of said note, upon the facts herein alleged, should be declared to be December 6, 1940, and defendant is ready and willing to carry out all the terms of said contract as provided in said note, and pay the same on its due date, as herein alleged, and said note and documents are now in the registry of this court and are hereby tendered to plaintiff." Defendant then prayed that defendant have all other and further relief to which he may be entitled, *in equity and in law*, and that defendant's second amended complaint be dismissed, and that plaintiff be compelled specifically to perform said contract.

TRIAL.

The case was tried the second time without a jury on the record on the first appeal as shown by the stipulation of the parties (R. in 11612, 20, 35). Judge Lemley made findings of fact at the request of the plaintiff (R. 21-25), which found in effect the agreement to be the agreement as found by Judge Ragan in the first trial, and by the United States Court of Appeals on the first appeal (R. 21-22) (Nakdimen v. Baker, 100 Fed. [2d] 195); that pursuant to the agreement, the note was signed by defendant, the certificate of stock in favor of plaintiff for 200 shares was surrendered and duly canceled, and the shares represented thereby were transferred from said certificate into a certificate for 200 shares in favor of defendant's wife, such certificate being executed by defendant as president, and by plaintiff as secretary of the City National Company; that the certificate was endorsed by her and the consent of defendant's wife was signed by her, and the note so signed, the certificate so endorsed and the consent so signed, were on December 7, 1935, and since, held in the

possession of defendant until January 27, 1938, when this case was tried before Judge Ragan, when the note, the certificate and the consent were filed in court. The Court found that after the transfer of the 200 shares defendant on December 7, 1935, and thereafter, to February 9, 1936, on demand of plaintiff, refused to make delivery to plaintiff of said note, said certificate and said consent.

"The court further finds that defendant on December 7, 1935, and to February 9, 1936, for his failure to deliver the note signed, the certificate endorsed and the consent signed, stated as his reason therefor that he would not do so until he had received certain requested information with reference to a claim against him of the estate of Lillie N. Lazarus, deceased, and on February 3, 1936, after he had received the requested information, that he would not deliver the signed note, the endorsed certificate and the signed consent until there was a settlement of the claim of the estate of Lillie N. Lazarus, deceased, against him;

"That plaintiff thereupon employed local counsel, Thomas B. Pryor, Esq., of Fort Smith, Arkansas, as his attorney in the matter; that thereafter, on February 9th, 1935, defendant offered to deliver the signed note, the endorsed certificate, the signed consent, but refused to reimburse plaintiff for obligations incurred on account of said refusal to deliver said note, certificate and consent, and refused to do anything save to then deliver the signed note, endorsed certificate and signed consent.

"That thereafter in October, 1936, suit was brought in this court against Iser Nakdimen and Celia Nakdimen, his wife, and a trial was had on January 27th, and January 28th, 1938, resulting in a verdict in favor of the plaintiff for the face amount of said note, $13,125.00, plus certain interest; that an appeal was taken from the verdict and the judgment thereon to the United States Court of Appeals, and that court reversed and remanded the case, and *it held that the promissory note was not a binding obligation before*

its delivery, and that 'since the note in question was never delivered by Nakdimen, the maker, to Baker, the payee, Baker never acquired any property right in it. The most that he had was a right of action for breach of contract and an equitable lien upon the 200 (fol. 32) *shares of stock.'* That court held the ultimate question to be whether the action was in assumpsit for damages for breach of contract, or in tort for damages for *conversion* of personal property, and held the lower court submitted the case to the jury on the theory that it was an action in tort for *conversion,* and in doing so, erred.

"An amended petition was filed herein, on the reversal and remanding of the cause, which is a petition for damages for breach of contract.

"The court finds that the agreed sales price was by agreement of December 6, 1935, $13,125.00.

"The court finds that for the failure and refusal to deliver the note signed, and the Celia Nakdimen certificate endorsed, and her consent signed, created in plaintiff a right to recover the sales price, $13,125.00.

"The court finds that the reason assigned by the defendant for refusal to deliver on December 7, 1935, and subsequently, to February 9, 1936, were not reasons creating in law a just excuse for such refusal to deliver.

"The court finds that defendant having failed and refused to deliver the note, certificate and consent on and from December 7, 1935, to February 9, 1936, thereby became personally obligated to pay the purchase price, $13,125.00, and that plaintiff was not obliged on February 9, 1936, or thereafter, to accept delivery of said note, certificate and consent, and to forego his right of action for failure and refusal of defendant to deliver the note, certificate and consent."

The Court gave plaintiff's requests for conclusions of law (R. 25), which again set forth the agreement, and further were (R. 26) as follows:

"2. Plaintiff was not on February 9, 1936, after defendant's wrongful refusal to deliver on December 7, 1935, and up to and including February 8, 1936, obliged to accept delivery and forego his right of action for defendant's refusal to keep his agreement to deliver the note, certificate and consent theretofore.

"3. Defendant is not entitled to have this case transferred to the equity side of the court.

"4. Defendant is not entitled to have a judgment or decree that plaintiff should accept the note, dated December 6, 1935, the endorsed certificate in favor of Celia Nakdimen as security therefor, and the consent of Celia Nakdimen to the pledging of said certificate of the shares represented by said certificate.

"5. Plaintiff is entitled to recover from defendant the sum of $13,125.00 and costs of court, with interest thereon at 6% per annum from the date of judgment.

"6. Plaintiff is and was at the time of the filing of this suit and continuously since has been a citizen and resident of the State of Missouri, and the defendant, Iser H. Nakdimen, during the same time has been a citizen and resident of the State of Arkansas, and of the County of Sebastian in said state, and the amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00."

The Court gave defendant's requested findings Nos. 1 and 2 (R. 27), which set forth the agreement.

Judge Lemley denied the further requests 3 to 12 (R. 28, 29) sought by defendant to the effect that any failure to deliver on December 7, 1935, was not a breach; that defendant did *not* breach the contract *"by the temporary postponement of the delivery of the note and other documents"*; that defendant tendered the note and other documents on December 7, 1935, and thereafter; that Baker on February 3rd offered to perform the contract and demanded performance, and plaintiff thereby *waived* any previous breach of contract, if there was a previous

breach; that the demand made by Baker on February 3, 1936, to perform the contract was an election to treat the contract as in full force and effect, and defendant had the right to accept that position and to tender full and complete performance on February 9th; "8. *The decision of the Court of Appeals in this cause OTHER THAN THE REVERSAL BECAUSE OF THE ERROR OF THE COURT IN TREATING THE CASE AS ONE IN CONVERSION AMOUNTS TO AN OPINION WHICH IS NOT BINDING UPON THIS COURT"; THAT THE SUIT IS NOT A SUIT FOR BREACH OF CONTRACT, BUT TO RECOVER THE PURCHASE PRICE NAMED IN THE CONTRACT, and "is based upon the theory that the contract was in full force and effect, and was not breached by the defendant except the allegation that the defendant had refused to pay the amount"*; that defendant was entitled to pay the note on December 7, *1940,* and the note is not due at this time; *that defendant was justified in his efforts to settle the other demand made upon him by the attorney for the plaintiff, and the evidence of the plaintiff and the evidence of the defendant is insufficient to show that Nakdimen abandoned or refused to perform the contract;* that the defendant has offered again and again to perform the contract, and is entitled to have the said contract performed, and is entitled to have until December 7, *1940,* to pay the note.

The Evidence on Which the Second Judgment Rested.

1.

The agreement between the parties of purchase and sale of the stock was found by the District Court to be the agreement as recited in the instruction of Judge Ragan (Record in 11,612, p. 22).

There can be no reasonable question, therefore, as a matter of fact, as to the terms of the agreement.

2.

Performance by Plaintiff.

There can further be no reasonable question, as a matter of fact, that plaintiff fully performed the agreement by canceling the shares theretofore held by him, and by his transfer on December 6, 1935, of the shares as agreed to defendant's wife, by certificate, for the 200 shares. *Plaintiff having fully performed his part of the contract, performance by defendant, according to the agreement, became due admittedly on December 7, 1936. Defendant was then required to make delivery of the note signed by him, the certificate endorsed by his wife, and the consent signed by his wife to plaintiff which defendant held on December 6, 1936, for delivery the next morning.*

3.

Breach of Contract.

There cannot be reasonable question, as a matter of fact, that the findings of fact of Judge Lemley, as above quoted, and as set forth on pages 23, 24 and 25 of the record, in 11,612, as to the breach of the contract by defendant, are borne out by the evidence. The testimony of defendant was most indefinite as to when he said he tendered the note, the certificate and the consent (R. 11,190, pp. 62, 63, 64), the effect of his testimony being he did not know when he made the claimed tender (R. 11,190, pp. 63, 64). The testimony of defendant and of his son was that defendant was to deliver December 7, 1935 (R. 11,190, pp. 61, 67, 68). His son Hiram testified, in effect, defendant refused to make delivery on December 7, 1935 (R. 11,190, pp. 67, 69). Defendant refused to perform on December 7 (R. 11,190, pp. 69, 74) his part of the contract, and from December 7, 1935, on (R. 11,190, pp. 44, 45, 46, 69), on continued demand of plaintiff, still refused to perform

his part of the contract, unless and until a claim of another, that had nothing to do with this one, was settled. (Defendant's son, it is true, also testified defendant four or five times a day—"innumerable times"—made tender of delivery [R. 11,190, pp. 76-77].)

There was no justification for the refusal on the part of Nakdimen. Between February 3 and February 9, 1936, plaintiff had employed local counsel (R. 11,190, pp. 46, 47).

CONTENTION OF APPELLANT.

The contention, in a word, of defendant, was that plaintiff should be denied his lawful remedy of compensation for the breach of contract of purchase and sale, fully performed by plaintiff in this action at law, and deliberately and unjustifiably breached by defendant, and that there should be an order for the dismissal of the case and that the plaintiff be ordered to accept the note, the certificate and the consent on the theory that plaintiff was obliged to so accept on February 9, 1936, when defendant got good and ready to make delivery, after he had theretofore without reason breached the agreement by refusing to do so, and that plaintiff must accept such undelivered note for $13,125.00 as payable December 6, 1940, two years after the original maturity date, as though it had been renewed.

AFFIRMANCE BY UNITED STATES COURT OF APPEALS.

The Appellate Court affirmed the judgment rendered by Judge Lemley.

CERTIORARI.

Defendant now seeks to have a further hearing by this Court.

POINTS AND AUTHORITIES.

I.

PETITIONER APPELLANT'S FOUR POINTS WERE WITHOUT MERIT.

Contention One of Appellant.

The first contention of appellant in the Court of Appeals that the lower court erred in refusing to transfer this cause to the equity docket, and in failing to compel appellee to specifically perform the contract involved, was without merit (Point VII in certiorari petition, page 33).

The District Judge having heard the case under the new rules of federal procedure *without a jury* by agreement, and having considered the alleged equitable defenses set up in the answer, and found them wanting, did not err in refusing to defendant "specific performance" *by plaintiff* of the contract. As plaintiff had completely performed on December 6, 1935, and defendant had deliberately refused to perform from that date to February 9, 1936, defendant was not on equitable principles in a position to assert any claimed right to specific performance *by plaintiff* of the contract. Plaintiff, if anyone, had a right to specific performance, not defendant. What defendant sought and seeks, is that the Court decree that plaintiff shall be required to forego the right the law gave him to compensation for defendant's deliberate, unjustifiable breach of contract, and that instead plaintiff be required by the Court to accept and receive instead the note and collateral deliberately withheld for over two months *as in full performance of defendant's obligation.* That is the "specific performance" appellant seeks—a specific performance he clearly is not entitled to. The obligation on defendant's part was to deliver the note and collateral on December 7, 1935, and was not an obligation on his part

to withhold and then offer, as in full performance of his obligation, to deliver after an unjustified refusal for over two months—when he got ready to do so.

Contention Two of Appellant.

Appellant's second contention was that the District Court erred in overruling the motion of defendant Nakdimen to dismiss the second amended complaint (Points I, II and III of certiorari petition, pages 21, 24 and 27).

Judge Lemley did not err in overruling the motion, as the second amended petition alleged the agreement, the performance by the plaintiff, the refusal to perform by the defendant, and sought compensation for the breach of the contract on the part of defendant.

Contention Three of Appellant.

The third contention of appellant was that the lower court, Judge Lemley presiding, erred in refusing to hold "that appellee Baker by his election and his demand of performance, by Nakdimen on February 3, 1936, conclusively elected to treat the contract as effective and binding, and that hence there could be no breach by Nakdimen," is without merit (Points V and VI of certiorari petition, page 32).

The fact plaintiff continued to demand on February 3, 1936, that defendant should do what defendant should have done on December 7, 1935, namely, deliver to plaintiff, pursuant to the terms of sale, the note and the endorsed certificate, *and that defendant then, as theretofore, deliberately and without justification refused so to do, in no respect ended the breach of the promise of defendant to deliver on December 7, 1935, or made such breach not a breach or waived or lessened it in any way.*

Defendant was, with or without demand, in pursuance of his promise, obligated to deliver on December 7, 1935.

Contention Four of Appellant.

Defendant's fourth contention was that the lower court erred in finding and deciding that defendant Nakdimen breached the contract on December 7, 1935 (Point IV in the certiorari petition, page 27).

The Court was amply justified from the evidence of plaintiff, from the evidence of defendant himself, and from the evidence of the son of defendant, that defendant not only failed but deliberately refused, without justification, to perform as agreed, on December 7, 1935, and thereafter, to and including February 9, 1935.

Sunderland Lectures on New Rules of Civil Procedure of the District Courts of the U. S., pages 2, 3 and 9;
1 Moore Federal Practice, Sec. 1.02, p. 35;
Carpenter v. Wabash Railway Co., 84 Advance Opinions, U. S. Supreme Court, 403;
Turn Verein Eiche v. Kionka, 255 Ill. 392, 99 N. E. 684, 687;
Emack v. Hughes, 74 Vermont 382, 52 Atl. 1061;
U. S. Auto Co. v. De Shong, 134 Ark. 392, 204 S. W. 103;
Sommer v. Nakdimen, 97 Fed. (2d) 715.

II.

THE WRIT OF CERTIORARI SOUGHT SHOULD BE DENIED.

Baker, as seller, having fully performed his part of the agreement of sale of the shares of the par value of $20,000 for an agreed purchase price of $13,125.00, by transferring the shares to Nakdimen, as buyer, and Nakdimen, having deliberately and without justification refused to perform his part of the agreement, namely, to deliver on December 7, 1935, to the seller Baker, Nakdimen note without interest in favor of Baker for $13,125.00, and the endorsed

certificate for the shares as collateral, and Nakdimen having continued without justification to so refuse delivery until February 9, 1936, plaintiff seller was entitled to recover $13,125.00 from the buyer Nakdimen, for the shares sold, and was not obliged to forego his right of action for compensation and accept delivery of the note and collateral on or after February 9, 1936, when Nakdimen, after deliberate refusal for over two months from the time agreed for his performance, finally got ready to then tender delivery *in full performance and settlement of his obligation to plaintiff*.

Neither law nor equity requires the seller to accept delivery of the secured note and to forego his right to compensation after over two months of deliberate, unjustifiable refusal of the buyer to perform by delivering his note and pledge.

When the seller has fully performed by a transfer to the buyer of the shares of stock sold, and the buyer is to contemporaneously deliver his note in favor of the seller in the amount of the agreed sales price therefor, with the endorsed stock certificate for the shares sold as collateral, and the buyer fails and refuses to so deliver the note and collateral, the compensation recoverable by the seller in an action for breach of the sale contract is such agreed sale price.

(As interest is by the judgment from the date of the judgment only, the question of what further interest prior thereto is recoverable is not here involved.)

12 L. R. A. (N. S.) 180, and Note;
Mechem on Sales, Sec. 1664;
6 Page on Contracts (2d ed.), Section 3226;
Bowman v. Branson, 111 Mo. 343, 19 S. W. 634;
Winningham v. Trueblood, 149 Mo. 572, 51 S. W. 399;
American Mfg. Co. v. Klarquist, 47 Minn. 344, 50 N. W. 243;

Deering v. Johnson, 86 Minn. 172, 90 N. W. 363;
Standard Lbr. Co. v. Deer Park Lbr. Co., 104 Wash. 84, 175 Pac. 578;
Haddaway v. Smith, 277 S. W. 728, 731;
Emack v. Hughes, 74 Vermont 382, 52 Atl. 1061;
Williston on Contracts, Revised Edition, Sec. 1295;
Kelly v. Pierce, 16 N. Dak. 234, 112 N. W. 995;
5 Williston on Contracts, Revised Edition 1937, Sec. 1471, Note 2;
Sutherland on Damages, Vol. 2, Sec. 644, page 2228;
Mechem on Sales, Vol. 2, pages 1364, 1365;
Klosterman v. Lubin, 113 W. Va. 353, 167 S. E. 871;
55 C. J., Sec. 946, page 944;
Hodges v. Blythe, 69 Okla. 163, 171 Pac. Rep. 16;
Giroux v. Bockler, 98 Ore. 398, 194 Pac. 178;
12 American Jurisprudence, Sec. 307, pages 862, 863;
24 R. C. L., page 97, Sec. 363;
5 Elliott on Contracts, Section 5081, page 1227.

ARGUMENT.

I.

PETITIONER APPELLANT'S FOUR POINTS BEFORE THE UNITED STATES COURT OF APPEALS WERE WITHOUT MERIT.

Contention One of Appellant.

The first contention of appellant that the district court erred in refusing to transfer this cause to the equity docket, and in failing to compel appellee to specifically perform the contract involved, was without merit. (Point VII here.)

The District Judge having heard the case with the new rules of federal procedure in effect, without a jury by agreement, and having considered the alleged equitable defenses set up in the answer, and having properly found them wanting, did not err in refusing to defendant "specific performance" by plaintiff of the contract. As plaintiff had completely performed by transferring his shares to defendant on December 6, 1935, and defendant had deliberately refused to perform from that date to February 9, 1936, defendant was not on equitable principles in a position to assert any claimed right to specific performance by plaintiff of the contract. Plaintiff, if anyone, might have had a right to specific performance, but not defendant. What defendant sought and seeks, is that the Court decree that plaintiff shall be required to forego the right the law gave him to compensation for defendant's deliberate, unjustifiable breach of contract, and that instead plaintiff should have been required by the Court to accept and receive the note and collateral deliberately withheld for over two months, as in full performance of defendant's obligation. That is the "specific perform-

ance" appellant wants—a specific performance he clearly is not entitled to. The obligation on defendant's part was to deliver the note and collateral on December 7, 1935, and was not an obligation on his part deliberately and unjustifiably to withhold and then offer as in full performance of his obligation to deliver when he got ready to do so after the refusal for over two months.

It was plaintiff that performed his part of the contract and defendant who refused to perform his obligation under the contract.

That being true, defendant had no right to "specific performance" of the contract.

The rules of civil procedure of the District Court of the United States have eliminated the conformity act, and the federal equity rules, and constitute a complete code of practice identical for law and equity. All procedural distinctions between law and equity have been abolished. In both law and equity there are the same pleadings, the same form of averments, the same motions, the same rules as to parties, the same counterclaims, the same joinder of actions, the same discovery, the same references, the same form of judgments (Printed Lectures of Edson R. Sunderland, before the Bar Association of St. Louis, September 29, 1938, pages 2 and 3). 1 Moore Federal Practice, Sec. 1.02, p. 35.

The new federal rules that took effect while the suit was pending are controlling. Carpenter v. Wabash Railway Co., 84 Advance Opinions, United States Supreme Court, page 403, January 29, 1940.

In pleading under the new rules a short and plain statement of the claim, showing that the pleader is entitled to relief, is all that is required. Neither the term "facts" nor "cause of action" are used, nor are "evidence" or "conclusions" prohibited. Rule 8 (a) (b). The test of a

good allegation is information sufficient to enable the party to plead and prepare for trial. Rule 12 (e) (Sunderland, Lecture before St. Louis Bar Association, September 29, 1938, page 9).

The second amended petition was governed by the rules of civil procedure for the District Courts of the United States, which became effective September 1, 1938, the reversal and remanding on the first appeal being thereafter and the second amended petition having been filed February 4, 1939.

This Case Was Heard by the Trial Court Without a Jury.

The District Court did not err in holding the Court should not compel Baker by "specific performance" to accept instead of damages, the belated delivery tendered February 9, 1936.

In Enelow v. New York Life Ins. Co., 293 U. S. 379, January 7, 1935, a case decided before the new rules went into effect, Section 274-B of the Judicial Code, U. S. C., Title 28, Sec. 398, which provides for equitable defenses in actions at law, was considered.

In the Enelow case it was held that a defendant was not entitled to trial to the Judge as Chancellor of an equitable defense set up in an action at law, under the provision therefor, in Judicial Code, Sec. 274-B, U. S. C. 28, Sec. 398, when a bill in equity to stay the action at law pending the termination of the issue, would not lie. The Court said (page 383):

> "The test under Section 274-B is whether the defendant could have maintained a bill in equity on the same averments. The unequivocal language of the provision leaves no room for the argument that the substantive jurisdiction of equity was sought to be changed or enlarged. The defendant's rights to a hearing in equity are the same, not greater, when he resorts to the summary procedure."

To maintain defendant's position it was incumbent on defendant to prove facts entitling him to the remedy sought, and to come into equity he had to come with clean hands, and such proof was not forthcoming.

As appears here beyond question, there was nothing on the part of the plaintiff to perform, for plaintiff had fully and completely performed everything he was required to do, when on December 6, 1937, he transferred his 200 shares of $100 par each, pursuant to the contract of sale. After that there was no further thing for him to do under the contract. After that it was for defendant to make the contemporaneous delivery, as agreed, on December 7, 1935, of the note and of the certificate endorsed.

In Turn Verein Eiche v. Kionka, 255 Ill. 392, 99 N. E. Rep. 684, 687, the rule with respect to the right to specific performance is stated as follows:

> "The party seeking to enforce specific performance must prove he has complied with, or that he was able, ready, and willing to comply with, *the terms of the contract, but was prevented from doing so by the refusal of the other party to perform it on his part.* The proof in such cases must be clear and satisfactory. Ralls v. Ralls, 82 Ill. 243; Rutherford v. Sargent, 71 Ill. 339; Hatch v. Kizer, 140 Ill. 583, 30 N. E. 605, 33 Am. St. Rep. 258.
>
> "*Where the parties have made the time of performance material, a court of equity has no power to enforce performance contrary to the expressed intention of the parties* (Skeen v. Patterson, 180 Ill. 289, 54 N. E. 196), and courts will indulge no presumptions in favor of a waiver or abandonment of the contract, nor will they infer waiver or abandonment from slight proof."

See, also, Emack v. Hughes, 74 Vermont 382, 52 Atl. 1061.

For defendant to be entitled to "specific performance" he was required to show defendant performed, that plaintiff did not perform and that plaintiff should be required to perform.

Here plaintiff performed and defendant without any excuse refused to perform.

No basis for "specific performance" is present.

Contention Two of Appellant.

Appellant's second contention was that the District Court erred in overruling the motion of defendant Nakdimen to dismiss the second amended complaint (Points I, II and III here).

Judge Lemley did not err in overruling the motion, because the second amended petition alleged the agreement, the performance by the plaintiff, the refusal to perform by the defendant, and sought compensation for the breach of the contract.

Again it appears, on page 23 of appellant's brief, that "the defendant in his answer to the second amended complaint sets up estoppel due to the inconsistent position taken by the plaintiff in the conversion suit and in this suit (R. 17)." It was contended, page 23, appellant Nakdimen's brief in the Court of Appeals in the second appeal, "*that the case must be dismissed because it cannot be maintained upon conversion, and it cannot be changed from conversion to contract.*"

In this case the action is by plaintiff for compensation for a breach in which plaintiff, as seller, has transferred title and possession to the shares to defendant and has fully performed, and in which defendant failed to keep his agreement to contemporaneously deliver the note and the certificate for the shares endorsed as collateral for the note.

The first contention under this head of defendant's

brief is that this suit cannot be maintained upon conversion. It will be remembered that this suit was held by this Court on the first appeal *on the contention of defendant* NOT to be a suit in conversion, *that it could not be because the note had not been delivered*, and therefore the note as a note of plaintiff could not be converted and that the action was for breach of contract.

The new or second amended petition alleges the agreement found by this Court to exist, alleges the full and complete performance of everything plaintiff was to do by the transfer by him of the shares to defendant's nominee, and the failure on the part of defendant as agreed by him to contemporaneously deliver the note to plaintiff, along with the endorsed certificate as collateral, and the petition sought compensation for this breach on the part of defendant. This is, it would seem, a petition for breach of contract.

The next contention is that the former petition, now contended by defendant to have been in conversion, cannot be changed from a petition in conversion to one in contract and that the case should have been dismissed.

It would seem that it does not lie in the mouth of plaintiff, who asserted in the Court of Appeals in the first appeal that the then petition was in contract, to now assert that it was not then in contract, but was in conversion.

Moreover, in U. S. Auto Company v. De Shong, 134 Ark. 392, 204 S. W. 103, the question of dismissal was considered and denied and the Court said with reference to the case of Grist v. Lee, relied on by petitioner at page 21 of his petition and brief in this Court:

> "It is true we have several times said that one may not sue for a tort and recover upon a contract. A number of cases so holding are cited in the case of Grist v. Lee, 124 Ark. 206, which is to the same effect * * *.

> "Appellee asked and was granted relief to which he was not entitled; but that fact furnishes no sufficient reason for refusing him the relief to which the undisputed evidence shows he is entitled * * *.
>
> "If the cause were dismissed, the trial of another suit would be in the same court, between the same parties and upon the same testimony * * *. Such circuity of action is contrary to the spirit and policy of our code of practice, and will not be required."

This statement of the spirit and policy of the code of practice of Arkansas appears in accord with Rule I of the Rules of Civil Procedure for the District Court of the United States, such ruling providing that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."

We respectfully submit that none of these contentions deserves further consideration.

The defendant contended, page 35 of the brief in the Court of Appeals:

> "What this court said in the conversion suit, 'The most that he (Baker) had was a right of action for breach of contract,' is obiter dicta, pure and simple."

It was contended further by defendant on page 37:

> "The negotiations in the making of the contract and the conduct of the parties thereto, tend to show a *constructive* delivery of the note, the consent and the certificate."

The contention of defendant now is, in effect, that the Court of Appeals erred in reversing the case on the first appeal on the ground there was no delivery.

This, of course, is in the face of the Court of Appeals' decision on the first appeal.

That Court took the position on the first appeal that as

the note had not been delivered, the action could not be considered as an action for its conversion, and that the action was, therefore, for the breach of the contract to deliver. (No mention was made by the Court of Appeals on the first appeal of respondent's right of action on the stock certificate.)

Judge Lemley did not err in overruling defendant's motion to dismiss the second amended petition in contract.

Contention Three of Appellant.

The third contention of appellant was that the lower court, Judge Lemley presiding without a jury, erred "in refusing to hold that appellee Baker by his election and his demand of performance, by Nakdimen on February 3, 1936, conclusively elected to treat the contract as effective and binding. Hence there could be no breach by Nakdimen," is without merit. (Points V and VI here.)

The fact plaintiff continued to demand on February 3, 1936, that defendant should do what defendant should have done on December 7, 1935, namely, deliver to plaintiff; pursuant to the sale, the note and the endorsed certificate, and the further fact that defendant then, as theretofore, deliberately and without justification refused so to do, in no respect ended the breach of the promise of defendant to deliver on December 7, 1935, or thereafter, or made such breach not a breach or waived or lessened it in any way.

Defendant was, with or without demand, in pursuance of his promise, obligated to deliver on December 7, 1935.

We need not repeat what we have said on these contentions.

Had defendant buyer on February 3, 1936, on demand of plaintiff, tendered delivery of the note and collateral, *and plaintiff received and accepted* the note and collateral

there would have been even then not a waiver of the prior breach from December 6, 1935, to that date, but a delivery receipt and acceptance, with the right still remaining in plaintiff to sue for any damages resulting from the breach up to that time.

But, and it is an important "but," defendant on February 3, 1936, as he had theretofore on demand, still deliberately and unjustifiably refused delivery, and the breach was on that day, as it was theretofore, still a breach.

The breach did not by such refusal on February 3rd cease to be such because of its then continuance or reiteration. Defendant still refused delivery unjustifiably, as he well knew, until a claim of another against him was settled. The *breach* was not by plaintiff on February 3, 1936, approved, assented to, ratified or in any way waived, and plaintiff, finding defendant obdurate in his attitude, then had to employ Mr. Pryor, of Fort Smith, as local counsel, to aid him in the situation. There was thus created in plaintiff, for defendant's deliberate, unjustified breach of over two months, of an obligation by contract required to be performed December 7, 1935, a right to recover $13,125.00.

Defendant's offer to deliver on February 9, 1936, plaintiff could either accept or reject. He was then willing to accept, as appears from the evidence, if defendant would reimburse him for the out-of-pocket expenses he had had to incur, due to defendant's unjustified refusal to deliver, otherwise he would not accept delivery February 9, 1936.

Defendant insisted plaintiff should stand the expense, and that plaintiff should then accept the belated delivery in *full* performance of defendant's obligation under the contract.

In other words, when defendant got good and ready to deliver, plaintiff, it is contended, was bound to receive

and accept the delivery that defendant was obligated to make December 7, 1935, over two months before.

And defendant asked the Court of Appeals to require the plaintiff to now accept delivery of the withheld undelivered note for $13,125.00 and the withheld undelivered collateral in full performance of defendant's promise to deliver on December 7, 1935, and that this Court order and adjudge that the undelivered note by its terms, due December 6, 1938, should be deemed to have been extended to December 6, 1940, and that the Court hold defendant should not be required to pay until December 6, 1940, the amount named in the original note for $13,125.00, and that this action should be dismissed.

This is a suit for breach where plaintiff has sold and delivered. It is a suit by a seller against a buyer, wherein the seller has fully performed by delivery of the thing sold, and the buyer has completely failed to deliver the note and the collateral for the thing sold. It is clear that with the duty on the defendant to deliver on December 7, 1935, there was a failure on the part of the defendant to then deliver. Demand could take away nothing from the buyer's obligation fixed by the agreement that defendant was to deliver the morning of December 7, 1935. The contention, however, now of the defendant is that because plaintiff on February 3, 1936, again demanded of defendant, or continued to demand, that he do what defendant was required to do by the terms of the agreement on December 7, 1935, that plaintiff thereby *waived* the failure to perform of defendant, *though the further fact is, as testified to by the plaintiff without denial by defendant that defendant then, as theretofore, refused to perform.*

The contention then is that the demand of performance and the refusal to perform on February 3, 1936, makes

that not a breach which was a breach then and theretofore.

We have never been able to follow this contention.

The breach continued from December 7, 1935, to February 9, 1936, as found on substantial evidence by the court below. Defendant by his conduct created a right in plaintiff to compensation for this breach, and, having done so, the breach is in no sense removed by the fact that subsequently defendant tendered delivery on and after February 9, 1936.

Contention Four of Appellant.

Defendant's fourth contention was the district court erred in finding and deciding that defendant Nakdimen breached the contract on December 7, 1935. (Point IV here.)

The Court was amply justified from the evidence of plaintiff, from the evidence of defendant himself, and from the evidence of the son of defendant, that defendant not only failed but deliberately refused, without justification, to perform as agreed, on December 7, 1935, and thereafter, to and including February 9, 1935.

We have shown fully in the statement and throughout the brief heretofore that defendant breached his contract on December 7, 1935. Plaintiff's testimony so shows. Defendant's testimony was uncertain. Defendant's son's testimony was that from December 9, 1935, for about two weeks, defendant as many as five times a day, "innumerable times," made tender to the plaintiff of the note and the collateral, and that plaintiff each time refused to accept it. The Court evidently did not believe that defendant made the tender "innumerable times" during this two weeks' period. It is clear from the evidence that defendant refused to deliver on December 7th, and the reason

for his refusal was the unjustifiable one that this plaintiff had to cause a settlement of a claim of another against defendant before defendant would make delivery. That claim of such other was never settled because the Court of Appeals in the suit on such other claim found that although Nakdimen acknowledged the obligation to such other by making a $40.00 payment thereon, still the Statute of Limitation of Arkansas barred recovery under its three-year statute, the suit having been brought not within three, but within five years. Sommer v. Nakdimen, 97 Fed. (2d) 715. At page 49 of petitioner's brief in the Court of Appeals it was contended that Baker's evidence as to Nakdimen's statements failed to show an absolute and unequivocal demand. The evidence is clear from the testimony of defendant's son and of defendant that defendant refused on December 7th to deliver and did so for the unjustifiable reason above mentioned. It is beyond question and not disputed, that on February 3, 1936, there was an absolute and unequivocal refusal to perform on the part of defendant, when he said he would not deliver until the other case was settled. Such evidence is sufficient to show that defendant absolutely and unequivocally refused to perform.

Defendant at page 56 of petitioner's brief in the Court of Appeals asked the Court to consider his points 3 and 4 together, to the effect that there was no breach, as a matter of fact shown, and second, that if there was a breach shown, that Baker by continuing on February 3, 1936, to demand performance of defendant, *and defendant's refusal then to perform*, thereby waived the breach on February 3rd, and on all the preceding days back to and including December 7th.

On page 58 in the Court of Appeals' brief there was reference made to documents Nakdimen wanted in connection with the other claim, that of Mrs. Lazarus, as executor,

against Nakdimen. The conduct of plaintiff, it is contended in connection with this other claim, in furnishing him certain information that the defendant wanted, was a waiver by plaintiff of defendant's obligation to perform on December 7th.

We cannot agree.

When, thereafter, on February 3, 1936, after defendant had received this information, about January 15, 1936, defendant still persisted in refusal, plaintiff certainly had the right to deem the refusal that had continued up to that time, to be the settled position of defendant, so as to justify employing Mr. Pryor, and to have the right to compensation for such breach of contract. When, therefore, defendant did finally discover, on February 9, 1936, as he said, that "two wrongs did not make a right" (R. 45), and offered to deliver to Baker but refused to pay any of the obligations that his refusal had caused Baker to incur, it appears there was no obligation on Baker to then accept the delivery offered by defendant.

II.

CERTIORARI SHOULD BE DENIED.

Baker, as seller, having fully performed his part of the agreement of sale of the shares of the value and for a purchase price of $13,125.00 by transferring the shares to Nakdimen, as buyer, and Nakdimen, having deliberately and without justification refused to perform his part of the agreement, namely, to deliver on December 7, 1935, to the seller, Baker, as payment for the shares sold, Nakdimen's note in favor of Baker for $13,125.00, and the endorsed certificate for the shares as collateral, and Nakdimen having continued without justification to so refuse delivery until February 9, 1936, plaintiff seller was entitled to re-

cover $13,125.00 from the buyer Nakdimen, for the shares sold, and was not obliged to forego his right of action for compensation and accept delivery on or after February 9, 1936, when Nakdimen, after deliberate refusal for over two months from the time agreed for his performance, finally got ready to tender delivery.

Neither law nor equity requires the seller to thus accept delivery of the note in full payment and forego his right to compensation after over two months of deliberate, unjustifiable refusal of the buyer to perform.

When the seller has fully performed by a transfer to the buyer of the shares of stock sold, and the buyer is to contemporaneously deliver his note in favor of the seller in the amount of the agreed sales price therefor, with the endorsed stock certificate for the shares sold as collateral, and the buyer fails and refuses to so deliver the note and collateral, the compensation recoverable by the seller in an action for breach of the sale contract is such agreed sale price. As interest is by the judgment from the date of the judgment only, the question of what further interest prior thereto is recoverable is not here involved.

There is abundant authority to sustain the position that where the seller has delivered the cause of action arises immediately for breach of an agreement by the buyer to give promissory notes payable in the future.

12 L. R. A. (N. S.) 180, and note;
Mechem on Sales, Sec. 1664;
6 Page on Contracts (2d ed.), Section 3226.

In *Bowman v. Branson*, 111 Mo. 343, 19 S. W. 634, plaintiff brought suit for defendant's failure to give certain promissory notes in compliance with the contract between plaintiff and defendant, plaintiff having fully performed his part of the contract, and it was held that plaintiff had an action for the breach of the contract to execute and de-

liver the notes, and the measure of damages was the face value of the notes, with interest according to their tenor, although the notes, if they had been executed, would not have been due at the time of the trial.

In *Winningham v. Trueblood,* 149 Mo. 572, 51 S. W. 399, plaintiff loaned $1,000.00 to defendant, for which defendant was supposed to give plaintiff a note and a mortgage. Plaintiff forwarded the $1,000.00 to defendant, but defendant did not deliver the note and mortgage. There were other issues in this case, but the Court indicated that plaintiff properly had a cause of action against defendant for the failure to deliver the note in accordance with the contract.

In *American Manufacturing Co. v. Klarquist,* 47 Minn. 344, 50 N. W. 243, it was held that damages may be recovered presently for breach of an agreement to execute a promissory note payable in the future, and the amount for which the note was to be given will prima facie be the measure of damages.

See, also, Deering v. Johnson, 86 Minn. 172, 90 N. W. 363;
Standard Lumber Co. v. Deer Park Lbr. Co., 104 Wash. 84, 175 Pac. 578.

In *Haddaway v. Smith* (Texas), 277 S. W. 728, 731, plaintiffs, as real estate brokers, were suing for commissions. Plaintiffs had secured purchasers for defendant's real estate, but defendant had not fulfilled the contracts. For some time plaintiffs, without success, attempted to induce defendant to perform the contracts. On January 8th defendant was notified that the contracts were forfeited, and that the purchasers would expect their money back. Defendant claimed that on January 10th he had offered to perform the contract. The Court held that it was not a waiver for a party not in default to make an honest effort to induce the party who had breached the contract to withdraw the repudiation and perform the contract.

In *Emack v. Hughes,* 74 Vt. 382, 52 Atl. 1061, the seller made an offer of delivery after breach of the contract, and the Court held, at page 1064: "Upon breach, the plaintiff's (buyer's) right of action accrued and could not be defeated nor affected by a subsequent offer to perform."

In *Williston on Contracts,* Sec. 1295, it is indicated that if the conduct of the promisor justifies the promisee in believing that no further performance will be rendered after breach, the promisee is justified in changing his position, and thereafter a tender of full performance will be ineffectual, and further, that when there has been an actual breach of the contract, the plaintiff's right of action accrues and cannot be defeated by a subsequent offer to perform.

In *Kelly v. Pierce,* 16 N. Dak. 234, 112 N. W. 995, it was held:

> "A vendee who refuses to perform his agreement to execute notes for the purchase price of personal property sold and delivered to him, may be sued by the vendor for damages for breach of the contract made upon the refusal to deliver the notes, and the measure of damages will be the contract price."

The Court stated:

> "We find that the great weight of authority is to the effect that, upon repudiating the agreement to execute notes, the vendor may at once sue for damages for breach of the contract. The vendor may withdraw his agreement to give credit upon the failure of the vendee to complete the contract according to its terms. We deem this the better rule, as it gives to each party the fruits of the contract. The following authorities fully substantiate this rule as to the remedy, as well as to the measure of damages: Hanna v. Mills, 21 Wend. 90, 34 Am. Dec. 216; Foster v. Adams, 60 Vt. 392, 6 Am. St. Rep. 120, 15 Atl. 169;

Young v. Dalton, 83 Tex. 497, 18 S. W. 819; Hays v. Weatherman, 14 Ind. 341; Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79; Mechem, Sales, Sec. 1664; Barron v. Mullin, 21 Minn. 374; Parson, Contr., 6 ed., 211; 24 Am. & Eng. Enc. Law, p. 1123, and cases cited; Stephenson v. Repp, 47 Ohio St. 551, 10 L. R. A. 620, 25 N. E. 803."

In 5 Williston on Contracts, Revised Edition 1937, Sec. 1471, Note 2, it is stated:

"Breach of a contract to execute a promissory note, payable in the future, gives rise to an immediate right of action on the contract seems unquestioned," and cites:

Deering v. Johnson, 86 Minn. 172, 90 N. W. 363;
Bowman v. Branson, 111 Mo. 343, 19 S. W. 634;
Kelly v. Pierce, 16 N. Dak. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180;
Giroux v. Bockler, 98 Oregon 398, 194 P. 178;
Standard Lbr. Co. v. Deer Park Lbr. Co., 104 Wash. 84, 175 P. 58, 176 P. 332.

At page 3933, Sec. 1411, he states:

"An action will lie for breach of the special promise to give the negotiable instrument and in such an action the damages are fixed by the amount of the agreed instrument."

Deering v. Johnson, 86 Minn. 172, 90 N. W. 363;
Bowman v. Branson, 111 Mo. 343, 19 S. W. 634;
Kelly v. Pierce, 16 N. Dak. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180;
Giroux v. Bockler, 98 Oregon 398, 194 P. 178;
Standard Lbr. Co. v. Deer Park Lbr. Co., 104 Wash. 84, 175 P. 58, 176 P. 332;
American Mfg. Co. v. Klarquist, 47 Minn. 344, 50 N. W. 243;
Hanna v. Mills, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216;
Rinehart v. Olwine, 5 Watts & S. (Pa.) 157.

In Sutherland on Damages, Vol. 2, Sec. 644, at p. 2228, it is stated:

"Where goods are sold to be paid for by bill or note payable at a future day, and the bill or note is not given, general assumpsit for goods sold and delivered cannot be maintained until the credit has expired, but the vendor may sue at once on the special agreement and recover the whole amount for which the bill or note should have been given or the value of the goods. (Copeland v. Fowler, 151 N. C. 353; Kelly v. Pierce, 16 N. D. 234, 12 L. R. A. [N. S.] 180; Thomas Mfg. Co. v. Watson, 85 Me. 300; Geiser Mfg. Co. v. Halzer, 110 Minn. 138; Hutchinson v. Reed, 3 Camp. 329; Mussen v. Price, 4 East 147; Haskins v. Duperoy, 9 East 498; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410; Loring v. Gurney, 4 Pick. 16; Hunneman v. Grafton, 10 Mete. [Mass.] 454; Fuller v. Sweet, 30 Mich. 237, 18 Am. Rep. 122; Barron v. Mullen, 21 Minn. 374; McCormick v. Basal, 46 Iowa 235; Rinehart v. Olwine, 5 W. & S. 157; Bicknell v. Buck, 58 Ind. 354; Stoddard v. Mix, 14 Conn. 12; Carnahan v. Hughes, 108 Ind. 225; Stephenson v. Ripp, 47 Ohio St. 551, 10 L. R. A. 620; Hanna v. Mills, 21 Wend. 90, 34 Am. Dec. 216; Am. Mfg. Co. v. Klarquist, 47 Minn. 344; Girard v. Taggart, 5 S. & R. 19, 19 Am. Dec. 716; Manton v. Gammon, 7 Ill. App. 201; Foster v. Adams, 60 Vt. 392, 6 Am. St. 120; Young v. Dalton, 83 Tex. 497; Osborne v. Bell, 62 Mich. 214.

"Such right of action rests not only upon the idea of breach of a special promise to give the evidence of indebtedness but also upon the theory that by the custom of merchants the note or bill might be made by getting it discounted."

In Mechem on Sales, Vol. 2, p. 1364, it is stated:

"But if the term of credit were given upon the condition that the buyer should give a note or other security for the price, and the buyer upon demand refuses to give the note or security as agreed, the seller, while he may not perhaps maintain assumpsit for the goods sold until that credit has expired, may yet sue imme-

diately for the breach of the special agreement and recover as damages the whole value of the goods, less, perhaps, the interest for the stipulated period."

Hanna v. Mills, 1893, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216;
Foster v. Adams, 1888, 60 Vt. 392, 15 Atl. R. 169, 6 Am. St. R. 120;
Young v. Dalton, 83 Tex. 497, 18 S. W. 819 (citing Hanna v. Mills);
Hays v. Weatherman, 14 Ind. 341;
Rinehart v. Olwine, 5 Watts & Serg. 162;
Morgan v. Turner, 1893, 4 Tex. App. 192, 23 S. W. 284;
Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79;
Osborne & Co. v. Bell, 1886, 62 Mich. 214, 28 N. W. 841;
Kokomo Strawboard Co., 1892, 134 N. Y. 92, 31 N. E. 248.

In *Klosterman v. Lubin*, 167 S. E. 871, 113 W. Va. 353, 364, it was held that where title has passed and the buyer breaches, the seller may sue for the full purchase price.

In 55 C. J., Sec. 946, page 944, the rule of the right to recover where there has been performance by the seller and title has passed to the buyer and the buyer has failed to pay the price as agreed, is recognized for the price or value of the goods.

In *Hodges v. Blythe*, 69 Okla. 163, 171 Pac. Rep. 16, the Court citing the North Dakota case, Kelly v. Pierce, and the case of Stephenson v. Repp, stated:

"While the general rule seeming to be that where goods are sold, to be paid for by a note due and payable at a future time and the note is not given, the seller cannot recover in assumpsit on the general count for goods sold and delivered until the credit has expired, yet it is almost universally held that he may immediately proceed for a breach of the special agreement to give the note. In this jurisdiction, how-

ever, where but one form of action is recognized, if the facts pleaded and proved established that a party is entitled to relief in any form (whether as in the instant case, for the purchase price of goods sold, or, nominally for damages for breach of a special contract), it would seem that he may obtain such relief in the only action known to the Code. The evidence here clearly shows a refusal of defendant to execute the notes as he had agreed for the purchase price of the automobile, which under the authorities, immediately gave rise to the very cause of action upon which recovery was had. In Stephenson v. Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620, it is held:

> " 'Where goods are purchased upon an agreement to give a promissory note for the price, payable in one year with interest, on a refusal of the purchaser to make and deliver the note after the goods have been delivered, the vendor may, without waiting for the expiration of the credit, maintain an action at once for the breach of the agreement, and the measure of damages will be the price of the goods sold and delivered.' "

In the body of the opinion it is said:

> " 'The plaintiff in error claims that the petition below does not state facts sufficient to constitute a cause of action, for the reason that the time of the credit on which the goods had been sold and delivered had not expired at the bringing of the action, and that he was not, therefore, so indebted to the plaintiff as that an action could be maintained for the price of the property sold and delivered. It will be conceded that under the common-law system of procedure a general assumpsit for goods sold and delivered could not have been maintained upon the facts stated in the petition—the time of the credit not having expired, there would have been no ground for averring an implied assumpsit. But this is not material under our system, where no particular form of action is recognized, and the plaintiff is entitled to recover, if

it appears from the facts stated in his petition that he is entitled to any relief. * * * The law applicable to the case is well stated by Brown, J., in Hanna v. Mills, 21 Wend. 90 (34 Am. Dec. 216); "When goods are sold to be paid for by a note or bill payable at a future day, and the note or bill is not given, the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired; but he can sue immediately for a breach of the special agreement. Mussen v. Price, 4 East 147; Dutton v. Solomonson, 3 Bos. & P. 582; Hoskins v. Duperoy, 9 East 498; Hutchinson v. Reid, 3 Campb. 329. In such an action he will be entitled to recover as damages the whole value of the goods, unless, perhaps, there should be a rebate of interest during the stipulated credit. The cases referred to by the counsel for the plaintiff in error give no countenance to the argument in favor of a different rule of damages. The right of action is as perfect on a neglect or refusal to give the note or bill as it can be after the credit has expired. The only difference between suing at one time or the other relates to the form of the remedy; in the one case the plaintiff must declare specifically, in the other he may declare generally: The remedy itself is the same in both cases. The damages are the price of the goods. The party cannot have two actions for one breach of a single contract; and the contract is no more broken after the credit expires than it was the moment the note or bill was wrongfully withheld." ' See, also, Kelly v. Pierce, 16 N. D. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180."

In *Giroux v. Bockler*, 98 Oregon 398, 194 Pac. 178, 183, 184, the Court stated:

"* * * where the defendant is in default in payments that were due, and he also refuses to perform the contract by executing the notes that would become due at the future dates under the terms of the contract the seller is on such state of facts entitled to the remedy against such breach by immediate en-

forcement of the whole obligation, such right existing by reason of the buyer's breach of agreement as a whole. 24 R. C. L., pp. 97, 98; Kelly v. Pierce, 16 N. D. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180; Stephenson v. Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620; Pasha v. Bohart, 45 Mont. 76, 122 Pac. 284, Ann. Cas. 1913C, 1250."

Time, at law, is of the essence of the contract (12 Am. Jur., Section 307, page 862). In equity, where there is an express stipulation, time is also of the essence (12 Am. Jur., p. 863).

In 24 R. C. L., page 97, Section 363, it is stated: that when goods are sold to be paid for by note or bill payable at a future day, and the note or bill is not given, the seller "can sue immediately for a breach of the special agreement," citing Hanna v. Mills, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216; Kelly v. Pierce, 16 N. D. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180; Stephenson v. Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620; Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327. See, also, Bradford v. Marbury, 12 Ala. 520, 46 Am. Dec. 264; Sidney School Furniture Co. v. Warsaw School Dist., 122 Pa. St. 494, 15 Atl. 881, 9 A. S. R. 124. Notes: 34 Am. Dec. 216; 3 L. R. A. (N. S.) 909. This right of action "is as perfect on a neglect or refusal to give the note or bill as it can be after the credit has expired * * *. *Where the provision for credit is not absolute but conditional on the buyer giving certain security for the price, it is held that on his failure to do so his right to the credit is lost and the seller may sue immediately for the price.*" (Citing Pasha v. Bohart, 45 Mont. 76, 122 Pac. 284, Ann. Cas. 1913 C 1250 [credit conditional on giving "bankable note"]; Foster v. Adams, 60 Vt. 392, 15 Atl. 169, 6 A. S. R. 120. Note: 12 L. R. A. [N. S.] 181.)

In 5 Elliott on Contracts, Section 5091, page 1227, it is stated:

> "Where the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against the buyer for the price of the goods. *This is self-evident, and is universally conceded.*" (Citing Scott v. England, 2 Dowl. & L. 520; Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084; Armstrong v. Turner, 49 Md. 589; Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. 117; Meagher v. Cowing, 149 Mich 416, 112 N. W. 1074; Wood v. Michaud, 63 Minn. 478, 65 N. W. 963; Hayden v. Demets, 53 N. Y. 426.)

The author further states:

> "* * * where by the contract payment of the whole or part of the price is deferred, and the buyer is to give a note or the like for the deferred payment, and fails to do so, the seller may maintain an action for breach of the contract before the expiration of the time of credit." (Citing Paul v. Dodd, 2 C. B. 800; Mussen v. Price, 4 East 147; Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79; Barron v. Mullin, 21 Minn. 374; Hanna v. Mills, 21 Wend. [N. Y.] 90; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561; Stephenson v. Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620; Girard v. Taggart, 5 Serg. & R. [Pa.] 19, 9 Am. Dec. 327; Foster v. Adams, 60 Vt. 392, 15 Atl. 169, 6 Am. St. 120.)

CONCLUSION.

Plaintiff seller and defendant buyer entered into an agreement for the sale of shares of stock, the terms of which are admitted.

Plaintiff seller admittedly fully performed his contract by transferring 200 shares of the City National Company

to defendant's nominee on December 6, 1935, on the admitted understanding that a contemporaneous delivery be made the morning of December 7, 1935, by defendant by delivering defendant's note for $13,125.00 in favor of plaintiff, the terms of which note were agreed on, and by delivery of the certificate of stock endorsed by defendant's nominee, and by further delivery of a consent of such nominee to the pledging of the shares of stock evidenced by such endorsed certificate.

Title and possession to the shares passed from plaintiff to defendant.

Defendant failed to perform by deliberately refusing to deliver the note and the endorsed certificate December 7, 1935, along with the consent, without lawful justification for such refusal. That attitude continued from that date on to February 9, 1936. Defendant on February 3rd continued his deliberate unjustified refusal in response to the demand on that date of plaintiff to make delivery. Plaintiff then employed local counsel to secure for plaintiff compensation for the breach of the contract. Plaintiff never waived his right to this compensation. He did offer to accept the return of the note and the certificate on February 9, 1936, on his reasonable request that defendant reimburse him the expenses he had been obligated to incur on account of defendant's refusal to deliver. All defendant would then or thereafter do, or has ever offered to do, was to deliver the note and the certificate of stock. Defendant's refusal to deliver on February 3, 1935, did not change in any respect the refusal of defendant to deliver prior to that time.

Plaintiff in no wise waived his right to compensation on February 3, when defendant then, as theretofore, refused delivery to plaintiff.

The contention of defendant that defendant is entitled to "specific performance," by which defendant means that plaintiff should be required by this Court to forego his

right of action for defendant's breach and to now accept and receive the note and the certificate, and to have this Court declare that such note due December 6, 1940, the agreed due date if the note had ever been delivered and the note had been extended on or prior to its due date December 6, 1938, is without merit. It is without merit because plaintiff is by law entitled, where title and possession to the thing sold have passed and defendant has failed to make agreed contemporaneous performance, to have compensation in money therefor. The law does not say that for breach of a contract of sale the seller is remitted for recovery to a delivery by the buyer of the note and the collateral whenever the buyer gets ready to deliver.

For anyone to recover in specific performance it is necessary for such person to allege *and prove*, first, the agreement of sale; second, the performance or willingness to perform by the one seeking specific performance at the agreed time, and, third, the refusal to perform at the agreed time by the one against whom specific performance is sought. Here every fact of performance is the reverse of any of the facts required for an action for specific performance, and demonstrates that the claim for specific performance is one that has no basis whatever. Here Baker, the seller in the supposed specific performance case, has fully performed by transfer of the shares. Here in the supposed specific performance case Nakdimen, the buyer, has deliberately refused, without justification, to perform. Under these circumstances the remarkable contention is made that Nakdimen, in the supposed specific performance case, who has wholly failed to perform, is entitled to compel Baker not to perform (because he had performed), but to waive the default of Nakdimen in failing to perform his part of the contract. In the case at bar we have shown that the plaintiff, Baker, for the deliberate, unjustified

breach by defendant, is entitled to compensation, measured by the face of the note agreed to be delivered by Nakdimen.

If equities are to be considered it should be remembered that Baker, a young man without experience, placed $20,000.00 in the stock in question; that he worked for a number of years with the understanding that he would receive a definite salary; that that salary was cut down from time to time until finally it was stated by defendant that he would not receive any more thereafter; that on December 6, 1935, under these conditions an agreement was entered into for the purchase price of the $20,000.00 face value of shares for $13,125.00, by the note in question, the difference representing the amount that had been theretofore paid Baker for his services. Having made this agreement the plaintiff in good faith transferred his stock as agreed, and defendant deliberately, and without any lawful justification for his conduct, refused to deliver the note and the endorsed certificate for the shares of security the next day, in accordance with the agreement, and continued this attitude of refusal for over two months, and then tendered delivery which he contends plaintiff should be obliged by this Court to accept as in full performance of defendant's obligation and that the case be dismissed.

It is respectfully submitted that plaintiff was entitled to recover, and that the judgment of the District Court, affirmed by the Court of Appeals, should be allowed to stand and that certiorari should be denied.

Respectfully submitted,

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